TEAGUE P. PATERSON, SBN 226659
VISHTASP M. SOROUSHIAN, SBN 278895
BEESON, TAYER & BODINE, APC
483 Ninth Street, 2nd Floor
Oakland, CA 94607
Telephone: (510) 625-9700
Facsimile: (510) 625-8275
Email: vsoroushian@beesontayer.com

Attorneys for Plaintiff
AFSCME LOCAL 101

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

AT SAN JOSE

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSÉ, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive, Defendants.	Consolidated Case No. 1-12-CV-225926 [*Consolidated with Case Nos. 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, 1-12-CV-227864, and 1-12-CV-233660*] ASSIGNED FOR ALL PURPOSES TO: JUDGE PATRICIA LUCAS DEPARTMENT 2 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AFSCME LOCAL 101'S MOTION FOR PAYMENT OF EXPENSES OF PROOF UNDER CCP SECTION 2033.420**
AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	Hearing Date: September 25, 2014 Hearing Time: 9:00 a.m. Courtroom: 2 Judge: Honorable Patricia Lucas Action Filed: June 6, 2012 Trial Date: July 22, 2013

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I. INTRODUCTION

Under California Code of Civil Procedure section 2033.420 ("Section 2033.420"), Plaintiff/Cross-Defendant LOCAL 101 of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES ("AFSCME" or "Plaintiff") is entitled to recover its reasonable expenses, including attorneys' fees, incurred in proving facts of consequence after trial because: (1) Defendants CITY OF SAN JOSÉ AND DEBRA FIGONE, IN HER OFFICIAL CAPACITY AS CITY MANAGER ("Defendants" or "City") denied certain facts in their response to Plaintiff's Requests for Admissions, Set One ("RFA"); (2) the admissions sought were of consequence; (3) those facts were proven; and (4) Defendants' denials were unreasonable and unjustified.

II. FACTUAL BACKGROUND

On August 20, 2012, Plaintiff served its first set of Requests for Admissions to Defendant. (Declaration of Teague Paterson in Support of Motion for Expenses, ¶ 12, Exh. A (hereinafter "Paterson Decl.") By agreement, the parties extended the deadline to respond to discovery, including the RFAs, until December 27, 2012. (Paterson Decl., ¶ 13, Exh. B.)

Around October 1, 2012, the City sent AFSCME a letter objecting to sixty-three (63) of the eighty-eight requests and stating that it would deny them because they allegedly: (1) were too general or (2) did not concern a question of fact[1] and paraphrased the law or official documents. (Paterson Dec., ¶ 14, Exh. C.) On October 12, 2012, the parties met and conferred over the contents of the City's letter and the need to supply responses to the RFAs. (Paterson Decl., ¶ 15.) On October 22, 2012, the City sent a letter purporting to relay its understanding of the parties' agreement pursuant to the earlier meet and confer. With respect to the RFAs, the letter stated that the City "agreed to respond to the few requests not objected to in [its] meet and confer letter" but that it was "not obligated to respond to the remainder of [AFSCME's concerns]." It followed, "You have reserved your right rights to seek r [*sic*] responses through further meet and confer." (Paterson Decl., ¶ 16, Exh. D.) On November 13, 2012, AFSCME sent its own letter stating that it disagreed with some of the City's previous characterizations of what was agreed to in the meet and confer and relaying its

[1] A request for admission may require the application of law to fact. (Code Civ. Proc., § 2033.010.)

own understanding. It reminded the City that it had "agreed to respond to the straight-forward, unambiguous Requests for Admission ("RFA") and then send us a letter identifying those RFAs to which it has not provided a response as well as the reason for not doing so." (Paterson Decl. ¶ 17, Exh. E.) AFSCME then reserved its right to "further object to the City's responses to the discovery requests, especially if they did not comport to the mutual understanding of the parties as set forth in this letter." (*Ibid.*)

On December 27, 2012, the City served on AFSCME its responses to its RFAs. (Paterson Decl., ¶ 18, Exh. F.) Its responses did not reflect either parties' articulated understandings of what resulted from the previous meet and confer. Rather, in relevant part, it unequivocally denied the following RFAs, while also including a variation of two boilerplate objections with each response: [2] 2, 3, 8, 18, 20, 21, 24, 25, 27, 32-34, 36, 37(1), 37(2), 38, 39, 42-45, 60, 61, 64, and 69. (See Paterson Decl., ¶ 19.) Specifically, these RFAs request the following:

- **Number 2:** "YOU ARE REQUESTED TO ADMIT THAT employees of San Jose have a right to receive the benefits that derive from the System under the terms and conditions in effect at the time such employee accepted employment with San Jose."
- **Number 3:** "YOU ARE REQUESTED TO ADMIT THAT San Jose employees' right to the benefits established under the System vested upon such employees' commencing employment with the City."
- **Number 8:** "YOU ARE REQUESTED TO ADMIT THAT Measure B reduces or eliminates portions of employee retirement benefits."
- **Number 18:** "YOU ARE REQUSTED TO ADMIT THAT prior to Measure B, the City has been responsible for ensuring payment of shortfalls between the System's assets and the actuarially-determined liability for all benefits owed by the System."

[2] In its responses mistakenly used number 37 twice. Its response to the second RFA it labeled "Request for Admission No. 37" was actually a response to what Plaintiff served as "Request for Admission No. 38." As a result the City's answers include responses to two RFAs labeled "Request for Admission No. 37," and the last RFA to which it responded is "Request for Admission No. 87." The last RFA AFSCME actually served was presented as "Request for Admission No. 88." In order to avoid confusion to the Court, this Motion refers to the RFAs as they were labeled in the City's responses. What Plaintiff originally labeled as RFA No. 37 is here forth referred to as RFA No. 37(1), and what it originally labeled as RFA No. 38 is here forth referred to as RFA No. 37(2).

- **Number 20:** "YOU ARE REQUSTED TO ADMIT THAT prior to Measure B, the City promised to provide under the System to Petitioner's members a defined benefit consisting of 2.5% of compensation multiplied by the number of years of employment for which the employee is eligible for credit under the System."
- **Number 21:** "YOU ARE REQUSTED TO ADMIT THAT member-employees of the System become eligible to receive the defined benefit consisting of 2.5% of compensation multiplied by the number of years of employment for which the employee is eligible for credit under the System on the earlier of reaching 55 years of age and completing five years of service, or completing a full 30 years of service regardless of age."
- **Number 24:** "YOU ARE REQUSTED TO ADMIT THAT prior to Measure B, the City promised to provide under the System to Petitioner's members a defined benefit that included a guaranteed cost of living adjustment ("COLA") consisting of 3% annual increase in the pension benefit."
- **Number 25:** "YOU ARE REQUSTED TO ADMIT THAT Measure B provides the City Council with discretion to eliminate or suspend COLA for a period of five years and thereafter may reduce by half the COLA benefit, or continue the suspension."
- **Number 27:** "YOU ARE REQUSTED TO ADMIT THAT Measure B reduces vested retirement benefits in the form of permitting elimination and reduction of COLA for both current and future retirees."
- **Number 32:** "YOU ARE REQUSTED TO ADMIT THAT Measure B requires that in order for employees to retain their vested entitlement to receive pension benefits, employees must agree to assume a *pro rata* portion of up to 50% of the City's obligation for the System's unfunded liabilities, in addition to employees' obligation to make payment of the normal cost of annual accrued benefits."
- **Number 33:** "YOU ARE REQUSTED TO ADMIT THAT an obligation to assume half of the City's responsibility for financing the System's unfunded liabilities equals approximately 16% of employees' gross pay."
- **Number 34:** "YOU ARE REQUSTED TO ADMIT THAT under Measure B employees that decline the obligation to assume a *pro rata* portion of up to 50% of the City's obligation for the System's unfunded liabilities are placed in to a "Voluntary Election Plan" ("VEP")."

- **Number 36:** "YOU ARE REQUSTED TO ADMIT THAT the VEP imposes a lower accrual rate for benefits for employees placed in to the plan."
- **Number 37(1):** "YOU ARE REQUSTED TO ADMIT THAT the VEP imposes a later retirement age for employees placed in to the plan."
- **Number 37(2):** "YOU ARE REQUSTED TO ADMIT THAT the VEP imposes an increased number of years-of-service retirement eligibility gradually each year, indefinitely, and with no limit for employees placed in to the plan."
- **Number 38:** "YOU ARE REQUSTED TO ADMIT THAT the VEP reduces and caps the annual Cost of Living Adjustment for employees placed in to the plan."
- **Number 39:** "YOU ARE REQUSTED TO ADMIT THAT the VEP defines the term "final compensation" to exclude the employee's compensation that would otherwise have been included in computing the employee's pension for employees placed in to the plan."
- **Number 42:** "YOU ARE REQUSTED TO ADMIT THAT both the VEP and the System as amended by Measure B, require members to accept a reduction in the vested right to receive promised retirement benefits upon retirement."
- **Number 43:** "YOU ARE REQUSTED TO ADMIT THAT prior to Measure B, the City's miscellaneous employees had the right to retire on the earlier of reaching age fifty-five or working for the City for thirty years."
- **Number 44:** "YOU ARE REQUSTED TO ADMIT THAT prior to Measure B, a member's annual service retirement benefit was computed with respect to his/her final compensation, which was defined by San Jose Municipal Code section 3.28.030.11, as the "highest annual compensation earnable by the member during any period of the twelve consecutive months of federated city service…."
- **Number 45:** "YOU ARE REQUSTED TO ADMIT THAT prior to Measure B, a member's full retirement benefit was the result of computing 2.5% of the member's final compensation (as defined in SJMC § 3.28.030.11) per year of service, defined by San Jose Municipal Code section 3.28.6809(B) as "1,739 hours of federated city service rendered by the member in any calendar year."
- **Number 60:** "YOU ARE REQUSTED TO ADMIT THAT after Measure B, obligations and debts incurred by the City are shifted onto the Petitioner's members."

- **Number 61:** "YOU ARE REQUSTED TO ADMIT THAT miscellaneous employees of the City have a vested interest in annual three percent increases to their pension benefit after retirement."
- **Number 64:** "YOU ARE REQUSTED TO ADMIT THAT Measure B, if implemented, would impair vested contractual rights with respect to miscellaneous employee's retirement benefits."
- **Number 69:** "YOU ARE REQUSTED TO ADMIT THAT when the City adopted Measure B it violated its promise to City employees that they would not be liable to finance public debt, or the System's or Plan's unfunded liabilities."

(Paterson Decl., ¶ 19, Exh. F.)

The City unequivocally denied each of these requests (Paterson Decl. ¶ 18, Exh. F). The City did not follow up with a letter identifying with explanation those RFAs to which it had not provided a response as it said it would during the parties' previous meet and confer; this was likely because it had unequivocally denied the pertinent requests. (Paterson Decl., ¶ 20.)

The aforementioned twenty-five (25) RFAs and Defendants' denials essentially boil down to a dispute over the following two issues of consequence:

ISSUE ONE: Whether AFSCME members and retirees enjoyed vested rights in the retirement benefits that the Court determined that Measure B impaired. (Request Nos. 2, 3, 18, 20, 21, 43-45, and 61.)

ISSUE TWO: Whether Measure B detrimentally altered and impaired those vested rights. (Request Nos. 8, 25, 27, 32-36, 37(1), 37(2), 38, 39, 42, 60, 64, and 69.)

Following defeat of summary judgment on these issues, a weeklong trial, substantial pre and post-trial briefing and post-trial hearing on the briefings, the Court entered its Statement of Decision ("Decision") on February 20, 2014. (Paterson Decl., ¶ 22, Exh. G ("Decision").) On April 30, 2014, the Court then issued its final Judgment in Consolidated Cases. (Paterson Decl., ¶ 23, Exh. H ("Judgment").) As is relevant to this Motion for Payment of Expenses pursuant to Section 2033.420 of the Code of Civil Procedure ("Motion"), the Court held that Sections 1506-A, 1507-A, and 1510-A of Measure B[3] violated Article I, Section 9 of the California Constitution ("Contracts Clause"). (Decision, p. 4:9-15.)

[3] Section 1506-A required employees to make increase pension contributions into the "Tier 1" pension plan. Section 1507-A established a Voluntary Election Program ("VEP"), or alternate

III. ARGUMENT

Under Section 2033.420, Plaintiff is entitled to recover its reasonable expenses, including attorneys' fees, incurred in proving facts of consequence in conjunction with the trial in this case because (1) Defendants unequivocally denied certain facts in its response to Defendant's Requests for Admissions; (2) the admissions were of consequence; (3) Plaintiff proved those facts; and (4) Defendants' denials were unjustified. (Code Civ. Proc. § 2033.420.)

"Requests for admissions … are primarily aimed at setting at rest a triable issue so that it will not have to be tried. Thus, such requests, in a most definite manner, are aimed at expediting the trial." (*Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 429.)

A responding party either objects to a particular request or answers its substance. (Code Civ. Proc.[4], § 2033.210(b).) When a party answers an RFA, it must "[a]dmit so much of the matter involved in the request as is true" and "deny so much of the matter involved in the request as is untrue." (Code Civ. Proc. § 2033.220(b).) Alternatively, a responding party may opt not to admit or deny a fact and, rather, "[s]pecify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge." (Code Civ. Proc. § 2033.220(b)(3).) Even where a responding party objects to an RFA, that party unequivocally responds to an RFA when it "answer[s] the entirety of the request[] by providing an admission and/or a denial." (*See AFSCME v. Metro. Water Dist.* (2005) 126 Cal.App.4th 247, 267 (hereinafter "*Water District*").)

RFAs that a responding party unequivocally denies may warrant cost of proof sanctions. (*Water District, supra,* 126 Cal.App 4th at 268.) Where the responding party's answer to an RFA is unequivocal, the propounding party is under no obligation to address any objections posed or motion to compel prior to bringing a cost of proof motion based on that RFA. (*Id.* at 268-69.)

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retirement plan for those who did not want to stay in the aforementioned Tier 1 Plan. Section 1510-A gave the City discretion to suspend and reduce the Cost of Living Adjustment ("COLA") under certain circumstances.

[4] The Code of Civil Procedure is hereinafter referred to as "Code Civ. Proc."

Section 2033.240 "is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was "of substantial importance…." (*Brooks v. Am. Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509 (hereinafter "*Brooks*").) To be of substantial importance, the RFA should have some direct relationship to one of the central issues in the case. (*Ibid.*)

A court may award a moving party costs of proof even if the party loses the lawsuit or does not prevail on every issue. (*See Smith v. Circle P. Ranch Co., Inc.* (1978) 87 Cal.App.3d 267, 276, 280 (trial court awarded $30,000 to losing party).) Also, a "losing "party's evidence may supply the "proof" required for an award of § 2033.420 sanctions to the prevailing party," if the prevailing party seeks sanctions. (*Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 736, 737.)

Importantly, when issues "are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required" and all expenses incurred on the common issues qualify for an award. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4t 1127, 1133 (citing cases) (hereinafter "*Akins*").)

A. Defendants Unequivocally Denied All RFAs Subject of This Motion

Defendants interposed objections to all of the RFAs that are subject of this Motion. However, with the exception of RFA number 69, each of the City's responses to those RFAs started with the word, "Denied." With respect to RFA number 69, the City interposed objections and concluded: "Subject to these objections, the City denies this request." Such responses constitute an unequivocal denial of the RFAs. (*Water District, supra*, 126 Cal.App.4t at 267.)

B. The Admissions Were of Consequence

As is relevant to this Motion, the Court held that Measure B violated the Contracts Clause of the state Constitution with respect to Sections 1506-A (Tier 1, Unfunded Accrued Actuarial Liability ("UL") Funding), 1507-A (Voluntary Election Program ("VEP")), and 1510-A (Cost of Living Adjustment ("COLA")). In demonstrating the unconstitutionality of the provisions, Plaintiff proved that each section constituted an unconstitutional impairment of vested rights that attached prior to Measure B's adoption pursuant to the following state law principles:

"[U]pon acceptance of public employment [one] acquire[s] a vested right to a pension *based on the system then in effect" and "on terms substantially equivalent to those then offered by the employer …."* (*United Firefighters v. Los Angeles* (1989) 210 Cal.App.3d 1095, 1102 (emphasis in original); *Pasadena Police Officers Assn. v. Pasadena* (1983) 147 Cal.App.3d 695, 703*; see also Betts v. Bd. of Admin.* (1978) 21 Cal.3d 859, 867 (public employee also earns vested contractual right to benefit improvements conferred during employment).) Although, "[a]n employee's vested contractual pension rights may be modified," such modifications that constitute a detriment to the employee must be "reasonable." (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 ("*Allen*").) To be "reasonable," alterations to pension rights must bear a material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in a disadvantage to employees should be accompanied by comparable new advantages. (*Id.*) The Court determined such was the case with respect to participants in the Defendant's pension plan. (See Statement of Decision, pp. 7:17-9:16, 16:3-17:3; Paterson Dec. ¶ 22, Exh. G.)

ISSUE ONE and **ISSUE TWO** RFAs were designed to encompass all the aforementioned legal principles with respect to Sections 1506-A, 1507-A, and 1510-A. Specifically, they addressed:

(1) Whether a member of the Federated City Employees' Retirement System ("System"), the retirement system to which AFSCME members and retirees belong, enjoyed a vested right to a pension benefit;

(2) The terms of that pension benefit, according to what the employer offered when he/she commenced work as well as benefit enhancements subsequently conferred;

(3) Whether the alleged pension modification resulted in detriment to the employee and

(4) Whether the disadvantage was not offset by a comparable new advantage.

C. Plaintiff Proved the Facts

Plaintiff carried the burden of proving the relevant facts in this case to the Court. (Evid. Code §§ 115, 500.) By ruling in Plaintiff's favor with respect to Section 1506-A, 1507-A, and 1510-A, the Court expressly and implicitly recognized the truth of each of the facts Defendants denied. (*See also Coates Capital Corp. v. Superior Court* (1967) 251 Cal.App.2d 125, 130 (courts not obliged to consider and decide arguments not forwarded by parties).)

1. RFAs Pertinent to Several Unconstitutional Sections of Measure B

Several of Plaintiff's RFAs sought admissions from Defendants that City employees enjoyed vested rights to retirement benefits by virtue of their employment with the City and that Measure B curtailed those rights. Defendants unequivocally denied those requests in whole.

In particular, RFAs 2 and 3 were **ISSUE ONE** RFAs designed to establish that System members enjoyed vested retirement rights upon commencing City employment. RFAs 8, 42, and 64 were **ISSUE TWO** RFAs aimed at establishing that Measure B impaired a panoply of vested retirement rights. RFA 42 posed that question specifically with respect to the VEP and Tier 1 benefit. Had Defendants' admitted these RFAs rather than unequivocally denying them, Plaintiff would not have had to expend resources in proving that Section 1506-A, 1507-A, and 1510-A were unconstitutional.

As part of its efforts in establishing the employees enjoyed vested rights, Plaintiff had to disprove many of Defendants' defenses, such as its argument that a purported reservation of rights clause in the City Charter prevented the vesting of rights. Plaintiff should also recover for its efforts in opposing these defenses, since a successful defense was essential to establishing the existence of vested rights impaired by Measure B.[5]

Additionally, Plaintiffs had to prove the truth of several RFAs related to the individual sections of Measure B deemed unconstitutional by this Court

2. Section 1510-A: Cost of Living Adjustment

The Court held that Section 1510-A violated the Contracts Clause of the state Constitution (Judgment, p.4:9-15), *i.e.*, that employees enjoyed a vested right to a three percent annual COLA and that Measure B impaired that right. Although the City did not argue at trial that Federated members had no vested rights to COLA payments (Decision, p. 23:3), it unequivocally denied two RFAs which

[5] The fact that some of these RFAs addressed the question of vested rights and impairment with respect to sections of Measure B which the Court ultimately allowed to stand does not preclude recovery, as these questions were to a large degree interrelated with respect to Measure B as a whole. (*Akins, supra,* 79 Cal.App.4th at 1133.) For example, the City's argued that the Charter's "reservation of rights" clause hindered the creation of any vested rights in general. It was necessary to successfully oppose this argument in prevailing on the sections of Measure B ultimately deemed unconstitutional.

sought admissions that members enjoyed a vested right to an annual three percent cost of living adjustment (RFA Nos. 24 and 61).

Furthermore, the City denied RFA 27, which requested it to admit that Measure B reduced vested retirement benefits by permitting "elimination and reduction of COLA benefits." However, the Court's decision confirms that Section 1510-A did just that: impaired the right to a COLA benefit.

3. Section 1506-A: Tier 1 Plan (Unfunded Liabilities)

In holding that Section 1506-A was unconstitutional, the Court agreed that Plaintiffs demonstrated "a vested right to have the City pay" UALs, a fact Defendants unequivocally denied in their response to RFA number 18. (Decision, p. 16:3-4.)

The Court also held that Section 1506-A "impairs vested rights" by shifting its responsibility to financing Tier 1 UALs to current employees. (Decision, p. 17:3.) In reaching its holding, the Court recognized that, with respect to current employees not governed by the VEP or Tier 2 plan, "this section provides for increased pension contributions up to 16%, but no more than 50% of the costs to amortize any non-Tier 2 pension unfunded liabilities." (Decision, p. 13:14-17.) These were facts which Plaintiff attempted to establish through RFA numbers 32 and 33, but which Defendants unequivocally denied. Finally, the Court held that Section 1506-A unconstitutionally impaired the vested right to have the City pay UALs. (Decision, p. 17:3.) RFA numbers 60 and 69 attempted to lay these issues to rest, but the City unequivocally denied them.

4. Section 1507-A: Voluntary Election Program

In rendering Section 1507-A unconstitutional, the Court implicitly recognized that the section detrimentally affected the vested rights of members placed into the VEP. RPD number 35, which the City unequivocally denied, sought an admission to that affect.

The Court also implicitly recognized that, prior to Measure B, Federated members enjoyed a vested right to certain level of retirement benefits that Section 1507-A detrimentally altered. The City unequivocally denied RFA numbers 20, 21, and 43-45, by which Plaintiff sought to establish the pre-Measure B retirement benefits. Furthermore, the City unequivocally denied RFA numbers 36, 37(1), 37(2), 38, and 39, by which Plaintiff sought to demonstrate that Section 1507-A reduced the level of benefits to which members were entitled prior to Measure B. These were all fairly straight-

forward matters to which there should have been no dispute, as they posed questions regarding simple questions of fact.[6]

Finally, RFA number 34 directly sought an admission that the VEP was tied to the Tier 1 plan, as amended by Section 1506-A, *i.e.*, that members who declined to assume the obligations imposed by Section 1506-A were placed in the VEP. The Court rejected Defendants' arguments to the contrary and agreed with Plaintiffs that Sections 1506-A and 1507-A were tied. (Decision, p. 7:11-24.) Resultantly, Plaintiffs proved the substance of the RFAs for which it seeks recovery.

D. Defendants' Denials Were Unjustifiable

Defendants lacked good reason to deny the RFAs at issue here. As shown below, with respect to the issues addressed by the RFAs, the City offered arguments for which there was little support in fact or law. They also failed to contest issues which they denied the truth of in their responses to these RFAs. Finally, many of the RFAs involved simple, cut-and-dry factual issues over which there should have been no dispute.

In the first instance, Defendants' argued that a purported "reservation of rights" clause in its pre-Measure B charter precluded the creation of vested rights. The Court rejected this argument - one which the City previously forwarded in support of its Motion for Summary Adjudication and which the Court rejected then as well (Paterson Decl., ¶ 27, Exh. J) - because it was unsupported by law. The Court found that no case, including the principle case Defendants relied upon in support of this position - *Walsh v. Bd. of Admin* (1992) 4 Cal.App.4th 682 - stood for the "broad conclusion …. that a reservation of rights necessarily precludes the creation of vested rights." (Decision, pp. 11:18-21, 25-28, 12:1-9.)

Even more significantly, the Court noted that the City's position was "contrary to the Supreme Court's language" in *Legislature v. Eu* (1991) 54 Cal.3d 492 (*see* Decision, p. 11:22-25); importantly, a government entity may not act or take a position contrary to law. (*See* 72 Ops. Cal. Atty. Gen. 173, *5 (*citing Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103-04).) Therefore,

[6] Furthermore, it was absolutely necessary for Plaintiff to make these showings in order to demonstrate the unconstitutionality of Section 1507-A. (*See Akins, supra*, 79 Cal.App.4th at 1133 (fee recovery permissible for issues interrelated with those for which recovery is permissible).)

any assertion by Defendants that they were justified in denying **ISSUE ONE** RFAs on grounds of this "reservation of rights" argument, or any other argument, was unreasonable. To the extent the City believes some of the amendments implicated by Measure B involved vested, and others unvested rights, under the Code of Civil Procedure the City was duty bound to admit in part, or deny in part, with explanation, as discussed above.

1. Section 1510-A: COLA

In *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 635 (hereinafter "*Wimberly*"), the Court awarded approximately $55,000 in fees and stated[7]:

> …Sometimes a party justifiably denies a request for admission based upon the information available at the time of the denial, but later learns of additional facts or acquires information which would have called for the request to be admitted if the information had been known at the time of the denial. If such a party thereafter advises ... that the denial was in error or should be modified, a court should consider this factor in assessing whether there were no good reasons for the denial. [internal citations omitted.] On the other hand, if a party in such circumstance stands on the initial denial and then fails to contest the issue at trial, a court would be well justified in finding that there had been no good reasons for the denial, thus mandating the imposition of sanctions.
>
> (Emphasis added.)

Again, the City unequivocally denied RFA Nos. 24 and 61, for example, which attempted to establish that Federated members enjoyed a vested right to a three percent COLA benefit. However, as the Court noted in its statement of decision, at trial the "City [did] not argue that there is no vested right to COLA payments ...." (Decision, p. 23:3.) Pursuant to *Wimberly*, Plaintiff is entitled to a fee award related to establishing that its members enjoyed a vested right to the COLA benefit.

With respect to **ISSUE TWO**, Defendants forwarded several theories the Court found lacking legal foundation because the cases offered in support thereof differed materially from this case. For example, Defendants relied on *San Bernardino Public Employeess Ass'n v. City of Fontana* (1998) 67 Cal.App.4th 1215 in arguing that Section 1510-A was not ripe for review. In rejecting this argument, the Court noted that *Fontana* held that a matter is not ripe for review where an agency has not yet modified benefits; however, Measure B obviously modified the COLA benefit in this case.

[7] The Court was quoting *Brooks, supra*, 179 Cal.App.3d at 509.)

(Decision, p. 23:8-14.) Furthermore, the Court held that Defendants' reliance on *Valdes v. Cory* (1983) 139 Cal.App.3d 773 was misplaced because "Section 1510-A exceeds the scope of what *Valdes* contemplates as potentially allowable" for a multitude of reasons. (Decision, pp. 23:15-24:1-7.) Therefore, Defendants' unqualified denial was neither reasonable nor justified.

2. Section 1506-A: Imposition of Liability for UALs

The Court recognized that Section 1506-A "provides for increased pension contributions up to 16%, but no more than 50% of the costs to amortize any non-Tier 2 pension unfunded liabilities." (Decision, p. 13:15-17.) As was the case with several RFAs related to the VEP which were discussed above, RFA numbers 32 and 33 sought to establish these simple foundational facts which Defendants should have been admitted without dispute. If Defendants disagreed with specific parts of either RFA, it should have denied those while admitting "so much of the matter … as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party. (Code Civ. Proc. § 2033.220(b)(1).) Rather, the City unequivocally denied the entirety of the RFAs, and its denials were therefore unreasonable and without justification.

Furthermore, although the City denied the fact that its employees had a vested right to having it pay for pension unfunded liabilities, the Court acknowledged that the Plaintiffs provided substantial evidence of such a right. (Decision, pp. 13:25-15:1-10.) In part, the City argued that changes in the 2010 Municipal Code allowed it to authorize additional employee contributions towards UALs. Not only did the Court note that the City "overstate[d] the effect of those ordinances," which specifically acknowledged that funding of the UALs was otherwise the City's obligation, but it also failed to address "how the conduct by only a portion of the bargaining units could affect the rights of employees not members of those units: for example, AFSCME made no such proposal." (Decision, p. 15:10-25.) Finally, the Court noted that Defendants furnished *no* legal authority to support the "remarkable proposition that, under the circumstances of such proposals, pension benefits could be transformed into compensation and that rights therefore would be forfeited by … waiver." (Decision, p. 15:23-28 (emphasis added).) Given that Defendants lacked any reasonable support for their position, it appears as though their denials with respect to this issue was unjustified.

In denying that Section 1507-A impaired vested rights, Defendants forwarded a legal argument regarding the "comparable new advantage" prong of the contracts clause inquiry, and it admitted it had "no authority for that novel interpretation" of the doctrine. (Decision, p. 16:2-17.) The Court ultimately characterized its argument as "illogical" and without legal support. (Decision, p. 16:26-27.)[8] As such, it appears as though Defendants acted unreasonably and without valid justification in denying the **ISSUE 2** RFAs related to Section 1506-A.

3. Section 1507-A: VEP

The City argued that because the VEP was allegedly unrelated to Section 1506-A, it was a stand-alone section and therefore valid. (Decision, p. 17:11-20.) Recognizing the contra-logical nature of this argument, the Court noted that the City's argument "ignores the language, structure and obvious purpose of section 1507-A: a voluntary alternative to section 1506-A." (Decision, p. 17: 17-18.) Disputing that the VEP did not impair vested rights on the basis of a belief that the alternate retirement plan was not tied to the modified Tier 1 plan is simply disingenuous and grounds for discovery sanctions.

Furthermore, RFA numbers 20, 21, 36, 37(1), 37(2), 38, 39, and 43-45 sought admissions as to non-controversial topics: the retirement benefits available to members prior to Measure B and the changes to those benefits Section 1507-A created. These were straight-forward inquiries, and Defendants should have admitted the truth of the matters without requiring proof of them. (*See Brooks, supra,* 179 Cal.App.3d at 510 (award justified if party lacked personal knowledge of subject but had available sources of information and failed to make a reasonable investigation to ascertain facts).)

[8] The Court should not consider Defendants' "re-phrasing" of the comparable new advantage doctrine and additional authority in support of forwarded in the post-trial brief, because they did not make such arguments at trial (*see* Decision, p. 16:17-20) and their position at trial is more telling of their basis of denying the RFA in December 2012. (*See generally, Barnett v. Penske Truck Leasing Co.* (2001) 90 Cal.App.4th 494, 497-99.) Even if the Court considered its altered position, Plaintiff reminds the Court that it characterized Defendants' post-trial argument as "distort[ing] the 'comparable new advantage' doctrine, and misread[ing] *Claypool v. Wilson* (1992) 4 Cal.App.4th 646]." (Decision, p. 16:23-27.) The Court concluded that "*Claypool* provided no support of the City's illogical formulation of the 'comparable new advantage' rule." (Decision, p. 16:26-27.)

IV. CONCLUSION

As set forth in the Paterson Declaration served herewith, Defendant's counsel made an earnest and good faith effort to break down the time and reasonable attorneys' fees required to establish the truth of **ISSUE ONE** and **ISSUE TWO**, as distinguished from other, less relevant factual disputes in this case and those related to sections of Measure B the Court did not deem unconstitutional. (Paterson Decl., ¶¶ 24-26.) Plaintiff does not seek fees for those disputes despite the fact that they also required time and attorneys' fees to address. The Total amount of time and reasonable attorneys' fees required to establish the truth of both issues is $68,481.86. (Paterson Decl., ¶¶ 24-26, Exh. I.) For the foregoing reasons, pursuant to Section 2033.420, Plaintiff respectfully requests that the Court enter an Order awarding Plaintiff reasonable attorneys' fees in the aforementioned amount.

Dated: July 30, 2014

BEESON, TAYER & BODINE, APC

By: _____
TEAGUE P. PATERSON
VISHTASP M. SOROUSHIAN
Attorneys for Plaintiff AFSCME Local 101

PROOF OF SERVICE

SANTA CLARA SUPERIOR COURT

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AFSCME LOCAL 101'S MOTION FOR PAYMENT OF EXPENSES OF PROOF UNDER CCP SECTION 2033.420

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ **By Personally Delivering** a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ **By Messenger Service** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure § 1011, by placing a true and correct copy thereof in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service.

☐ **By UPS Overnight Delivery** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ **By Facsimile Transmission** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, July 30, 2014.

Esther Aviva

SERVICE LIST

Greg McLean Adam, Esq. Jonathan Yank, Esq. Gonzalo C. Martinez, Esq. Amber L. Griffiths, Esq. CARROLL, BURDICK & McDONOUGH LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 jyank@cbmlaw.com agriffiths@cbmlaw.com jstoughton@cbmlaw.com gmartinez@cbmlaw.com *Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOCIATION (Santa Clara Superior Court Case No. 112CV225926)*	Arthur A. Hartinger, Esq. Geoffrey Spellberg, Esq. Linda M. Ross, Esq. Jennifer L. Nock, Esq. Michael C. Hughes, Esq. MEYERS, NAVE, RIBACK, SILVER & WILSON 555 12th Street, Suite 1500 Oakland, CA 94607 ahartinger@meyersnave.com jnock@meyersnave.com lross@meyersnave.com mhughes@meyersnave.com *Attorneys for Defendants, THE CITY OF SAN JOSE AND DEBRA FIGONE*
John McBride, Esq. Christopher E. Platten, Esq. Mark S. Renner, Esq. WYLIE, McBRIDE, PLATTEN & RENNER 2125 Canoas Garden Avenue, Suite 120 San Jose, CA 95125 jmcbride@wmprlaw.com cplatten@wmprlaw.com *Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY McCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112-CV-225928)* *AND* *Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112-CV-226574)* *AND* *Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112-CV-226570)*	Harvey L. Leiderman, Esq. REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 hleiderman@reedsmith.com *Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926)* *AND* *Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928)* *AND* *Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV22574)* *AND* *Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)*

Stephen H. Silver, Esq. Richard A. Levine, Esq. Jacob A. Kalinski, Esq. SILVER, HADDEN, SILVER, WEXLER & LEVINE 1428 Second Street, Suite 200 Santa Monica, CA 90401-2367 jkalinski@shslaborlaw.com shsilver@shslaborlaw.com rlevine@shslaborlaw.com *Attorneys for Plaintiffs, SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT and ROSALINDA NAVARRO (Santa Clara Superior Court Case No. 112CV233660)*	